Attachment A

Consent Decree

Between United States of America and ATOFINA Chemicals, Inc.

Entered Copy

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
v.	:	
	:	
ATOFINA CHEMICALS, INC.	:	No. 01-7087

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. August 5, 2002

The United States, filing a complaint against Atofina Chemicals, Inc. ("Atofina") on behalf of the Environmental Protection Agency ("EPA"), alleged Atofina failed to comply with multiple environmental statutes and regulations at six of its chemical processing facilities. The parties having negotiated a settlement, the United States published a proposed consent decree for public comment for thirty days as required by 28 C.F.R. § 50.7. A non-party, the LeMoyne Community Advisory Panel ("LCAP"), a community group allegedly affected by Atofina's wrongdoing, made the only objections. The United States now moves for entry of the consent decree.

The United States' Motion for Entry of a Consent Decree requires the court to evaluate if the proposed settlement fairly, adequately, and reasonably serves the public interest. The court has concerns about that portion of the consent decree objected to by LCAP, the "Supplemental Environmental Project" provision, but

the Motion of the United States for the Entry of the Consent Decree will be granted.

I. Factual and Procedural Background

A. *Allegations Against Atofina*

Atofina Chemicals, a Pennsylvania corporation, operates chemical product manufacturing facilities ("facilities") at: Axis, Alabama; Calvert City and Carrollton, Kentucky; Beaumont and Houston, Texas; and Piffard, New York. The United States brought fifteen claims against Atofina for alleged polluting activities at these facilities. The allegations of the complaint are summarized below.

1. Axis, Alabama

The Axis, Alabama facility violated provisions of the Clean Air Act, 42 U.S.C. §§ 7409 - 7411, by constructing, and modifying, the 200/300 process units, the thioglycolic acid process unit, Dryer A, Dryer B, and the Metablen I and Metablen II impact modifer units. Atofina failed to undergo the review and permit application process necessary when a company creates a major new source of pollution or makes a "major modification" to an old source.

The facility also violated the Clean Water Act, 33 U.S.C. § 1311, by discharging pollutants into the following waters of the United States: Mobile River; Cold Creek; and a tributary of Cold

Creek. These discharges exceeded the limits provided by NPDES Permit No. AL0042447.

2. Calvert City, Kentucky

The Calvert City, Kentucky facility violated provisions of the Clean Air Act by modifying its Kynar Monomer and Polymer plants and constructing a F134a plant. The company failed to receive the pre-approval necessary when a company creates a major new source of pollution or makes a "major modification" to an old source. The facility also failed to apply for a permit to "de-bottleneck" its K098 plant to increase production without performing the required analysis of the best available control technology at this location. See 40 C.F.R. § 52.21(j)(3).

This same facility violated the Clean Water Act by discharging pollutants into waters of the United States in levels exceeding those permitted by KPDES Permit No. KY003603, by modifying how it tested those discharges, and by failing to notify the State Department of Environmental Protection or the EPA of these discharges and modifications.

The Calvert City facility also violated the Emergency Planning and Community Right to Know Act ("EPCRA"), 42 U.S.C. § 11045(c)(1), by failing to report, or underreporting, on a chemical release form, releases of chlorine, carbon tetrachloride, and CFC-11 into the environment.

3. Carrollton, Kentucky

The Carrollton, Kentucky facility violated the Clean Water Act by discharging pollutants into the waters of the United States in levels exceeding those permitted by KPDES Permit No. KY0001431.

The facility also violated the Resource Conservation and Recovery Act ("RCRA"), as amended by the Hazardous and Solid Waste Amendments Act of 1984, 42 U.S.C. §§ 6922-25, by failing to install necessary equipment to control emissions from a hazardous waste stored in Treatment Tank TK-52-20 ("the Hydropulper").

Finally, the facility violated EPCRA by failing to report correctly the amounts of methyl-ethyl ketone, xylene, and chloromethane released into the environment from 1994 to 1997.

4. Beaumont, Texas

The Beaumont, Texas facility's Hydrogen Sulfide ("H_2S) plant had a permit, obtained in 1989, to vent pollution through a flare when an incinerator built for that purpose was not in service. The permit limited the flare's use to specified periods. In 1995, the flare's use exceeded the time limitation, in violation of Section 113(b) of the Clean Air Act.

The facility's second violation occurred in 1995, when it released visible emissions for a time exceeding that permitted by the applicable federal regulations. See 40 C.F.R. § 60.18(c)(1), (f).

The facility's third violation also occurred in 1995 when it had "39 upsets, 21 shutdowns, and 13 other events," in violation of the Clean Air Act. See 40 C.F.R. § 60.11(d).

5. Houston, Texas

The Houston, Texas facility discharged pollutants into the Houston Ship Channel (United States waters), in levels exceeding those permitted by NPDES Permit No. TX0007064, in violation of the Clean Water Act. The facility also discharged more than 3.9 million gallons of untreated storm water and wastewater into United States waters; it lacked adequate retention capacity in times of heavy rain.

6. Piffard, New York

The Piffard, New York facility violated EPCRA by failing to report correctly the amounts of methyl-ethyl ketone released into the environment from 1994 to 1996, and t-butyle alcohol released from 1994 to 1995.

The government demanded that Atofina comply with the applicable regulations immediately, and that the court assess civil penalties.

B. *The Consent Decree*

Atofina, without admitting liability for any of the charges of the Complaint, assents to the following injunctive, monetary, and supplemental relief.

1. Injunctive Relief

a. Clean Air Act Violations

Atofina will: (1) operate its existing thermal oxidizer to destroy 95% of volatile organic compounds from the Calvert City Monomer Plant; (2) use an existing incinerator to destroy 95% of ozone depleting substance emissions from its Calvert City K-98 Plant; (3) install a thermal oxidizer to destroy 95% of organic compound emissions from the Carrollton facility; and (4) install a "Nitrogen Demand System" at the Carrollton facility.

b. Clean Water Act Violations

Atofina will: (1) install and operate continuous pH monitoring equipment at its Calvert City and Carrollton facilities, and report results to the permitting authority; (2) apply for and obtain modification of permits to reflect the new system of continuous monitoring; and (3) construct stormwater facilities and develop a management plan for the Houston facility.

c. RCRA violations

Atofina will install a fixed cover and slide gate system on the Hydropulper at the Carrollton facility.

2. Civil Penalties

Atofina will pay a fine in the amount of $1,900,000 to the United States Treasury.

3. Supplemental Environmental Project

The United States, as part of the consent decree, allowed Atofina to pay less in civil penalties and perform a Supplemental Environmental Project ("SEP") instead.

The proposed SEP would beautify and remediate a mile-long section of the Montlimar Canal, in Mobile, Alabama, at a total cost of $300,000. The Montlimar Canal is a tributary of the Dog River that in turn flows into the Mobile Bay. Pollutants from Atofina's Axis, Alabama facility also flow into Mobile Bay, through different waterways.

The SEP will have the following characteristics:

a. A "greenway" will be built along the Canal. This greenway will reduce erosion into the Canal;

b. A hiking, biking, and exercise trail will transverse the western bank of the Canal;

c. The trail will include educational stations focusing on the relationship between water quality in the City of Mobile and water quality in the Mobile Bay;

c. The remediation project, when combined with a series of "Greenway Parks" along the Canal, will double the acreage of existing parks in the City of Mobile.

4. Continuing Jurisdiction

The consent decree provides that the court will retain jurisdiction over this action to enforce the terms of the settlement and to adjudicate disputes between the parties about

its provisions. Disputes will be brought to court only after the parties engage in private negotiation. The court's continuing jurisdiction will terminate: (1) on the United States' motion; or (2) on Atofina's motion, if the company certifies that it has complied with the decree and the United States does not object within sixty (60) days.

C. *Objections to the Consent Decree*

LCAP provided the only comment during the public notice period. LCAP's objections, fairly read, state: (1) no part of the SEP will be performed in the LeMoyne Community where Atofina's Axis plan is located; (2) no member of LCAP was advised of the proposed SEP while it was being developed; (3) alternative projects in LeMoyne County would directly help those harmed by Atofina's wrongdoing.

LCAP renewed its objections with the court: an evidentiary hearing was held to consider LCAP's claims that it had no notice of the consent decree and the local community would derive no benefit from the SEP. Later its representative asserted that the SEP would replace projects already funded by the United States or Alabama's Department of Environmental Management.

D. *Supplemental Evidence about the SEP*

The government presented no evidence at the evidentiary hearing, but requested leave to file supplemental evidence about the genesis and impact of the SEP. The government, Atofina, and

LCAP have all filed materials about the genesis and value of the SEP.

1. The Government's Supplemental Submissions

The United States submitted the affidavit of Thomas C. Welborn, Chief of the Wetlands, Coastal, and Watersheds Branch of the Water Management Division of the EPA, Region 4. EPA Region 4 is responsible for administering Federal environmental programs in Alabama. Welborn avers that he is knowledgeable of federal funds directed toward remediation efforts in the Mobile Bay Estuary program, and no federal or state "monies have been used, or are planned to be used, for restoration of the Montlimar Canal or associated projects."

2. Atofina's Supplemental Submissions

Atofina submitted the affidavit of Treena Piznar, one of its employees. Piznar was a Senior Environmental Engineer at Atofina's Axis plant when the SEP was being developed. She avers that she obtained a list of possible SEP projects from the Alabama Department of Environmental Management.

3. LCAP's Supplemental Submissions

LCAP submitted evidence to establish that the Montlimar Canal will soon receive, or has received, Federal and/or State environmental funding. For example, LCAP has submitted a National Estuary Program map listing the Mobile Bay as an area receiving Federal funds for study and environmental repair.

II. **Discussion**

A. *Standard of Review*

A consent decree must fairly, adequately, and reasonably resolve the pending controversy, while remaining consistent with the public interest. See Walsh v. Great Atlantic & Pacific Tea Co., Inc. 726 F.2d 956, 965 (3d Cir. 1983). District courts have discretion either to accept, or to reject, a proposed consent decree: the court may not modify the settlement into one which it "considers as ideal." United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990); see also United States v. Southeastern Pennsylvania Transp. Auth. ["SEPTA"], 235 F.3d 817, 822 (3d Cir. 2000) (describing limited discretion of district court); Officers for Justice v. Civil Service Com., 688 F.2d 615, 630 (9th Cir. 1982) (lack of power to modify).

In the context of environmental litigation brought by the United States, the court owes "deference ... to [the] EPA's expertise and to the law's policy of encouraging settlement." SEPTA, 257 F.3d at 822. Because the EPA is invested with special expertise about environmental torts, and uses that expertise in crafting judicious compromises, settlements approved by the EPA are especially favored. See United States v. Cannons Eng'g Corp, 899 F.2d 79, 84 (1st Cir. 1990).

In determining if the settlement is fair and adequate, an important consideration is its application to the purposes of the environmental statutes forming the basis of the complaint.[1]

The rationale for deference to the EPA's judgment about the costs of Atofina's alleged wrongdoing, and the societal benefits accruing from the consent decree, is clear. The EPA, unlike the court, is well-placed to evaluate fairly the social harms caused by events like the H_2S flare. The EPA, unlike the court, has considered the complex benefits flowing to society from requiring 95% destruction of polluting gases at Atofina's facilities, building a stormwater drainage facility in Texas, and constructing a fixed cover and slide gate system on the Hydropulper in Kentucky. The EPA is best placed to balance

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[1]In passing the Clean Water Act, Congress undertook the "restoration and maintenance of chemical, physical and biological integrity of Nation's waters. 33 U.S.C. § 1251. To achieve these objectives, Congress hoped to: (1) immediately end discharge of pollutants into waters of the United States; and (2) provide federal funds to construct waste treatment facilities. Id. at 1251(a). The Clean Air Act's goal is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare ..." 42 U.S.C. § 7401(b)(1). RCRA's primary policy goal is to "reduce[] or eliminate[the creation of hazardous waste] as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. 6902(b). ECPRA, as its title suggests, aids emergency preparedness by enabling authorities to know the nature and location of hazardous chemicals in their jurisdictions. See U.S. v. BP Exploration & Oil Co., 167 F.Supp.2d 1045, 1054 (N.D. Ind. 2001).

environmental harms and benefits against each other: the court's discretion to re-weigh the balance is necessarily limited.

B. *Injunctive and Civil Relief*

Although this consent decree does not provide for injunctive relief from each and every alleged violation of the environmental laws (for example, ECPRA and RCRA violations apparently are remedied only through civil fines), the EPA's judgment that the civil penalties and remedial provisions fairly, adequately, and reasonably resolve this action is unchallenged.[2]

By this settlement, the United States avoids prolonged litigation with its attendant risks. Atofina's willingness to settle the claims against it makes it more likely that it will comply, in good faith, with the terms of the decree. Those terms create new waste management facilities, and new air pollution control mechanisms, and penalize the Atofina almost two million dollars. The court finds that the consent decree's substantive components serve the policies of the allegedly violated environmental statutes and the public interest.

C. The SEP

The EPA's Supplemental Environmental Projects Policy (the "Policy") provides an Agency guideline for allowing an environmentally beneficial project to mitigate civil penalties

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[2]LCAP raises no objection to the substantive components of the consent decree.

due the United States for environmental violations. See Final EPA Supplemental Environmental Projects Policy, 63 Fed. Reg. 24796 (1998); see also EPA, Supplemental Environmental Projects (last modified Jun. 19, 2002) <http://www.epa.gov/Compliance/planning/data/multimedia/seps/sep.html>. The Policy was intended to clarify the EPA's authority to negotiate SEPs in the response to claims by the General Accounting Office, and the Department of Justice, that the EPA's use of SEPs exceeded its delegated authority. See Quan B. Nghiem, Comment, Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act, 24 B. C. Envtl. Aff. L. Rev. 561, 570-71 (1997); Kathleen Boergers, The EPA's Supplemental Environmental Projects Policy, 26 Ecology L.Q. 777, 784 (1999). The United States has not provided the court with clear Congressional authorization for the EPA's agreeing to the SEP in this consent decree.[3] But, in the absence of any challenge by LCAP, the court declines to rule on this issue sua sponte.

The Policy imposes several conditions that a SEP must meet. Of those conditions, three are relevant here. A proposed SEP: (1) must have an "adequate nexus" with the underlying violation,

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[3]The sole exception is the Clean Air Act, which provides that up to $100,000 of any civil penalty may be used in "beneficial mitigation projects." 42 U.S.C. § 7604(g) (1994). The SEP in this consent decree remedies violations of the Clean Water Act.

63 Fed. Reg. 24796, at 24798;[4] (2) can not duplicate remedies the defendant is not otherwise obligated to perform, id.; and (3) should be informed by local community input, id. at 24803.

The Policy states that it is "not intended for use by EPA, defendants, respondents, courts or administrative law judges at a hearing or in trial." Id. at 24797. The decision to accept an SEP is "purely within EPA's discretion," id., and the Policy itself may be modified "with the advance approval of Headquarters." Id. The Policy "does not create any rights, duties, or obligations, implied or otherwise, in any third parties." Id. at 24804. In light of this language, it is unclear if violations of the Policy require, or allow, a court to reject a consent decree.

Even if the court had the clear authority to enforce the terms of the EPA policy, it lacks the power to modify the consent

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[4]An "adequate nexus" exists if:

a. The project is designed to reduce the likelihood that similar violations will occur in the future; or

b. The project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or

c. The project reduces the overall risk to public health or the environment potentially affected by the violation at issue. 63 Fed. Reg. 24796, at 24798.

One factor in nexus inquiry is geographic proximity: an adequate nexus is easier to establish if the proposed SEP is within 50 miles of the location of the violations. The SEP may have a sufficient nexus even if it addresses a different pollutant in a different medium.

decree by striking the SEP and leaving the rest of the agreement intact. Given the choice of rejecting or accepting the agreement as written, the public interest is served by entering the consent decree.

The proposed SEP does have an adequate nexus with the violations at the Axis, Alabama factory. The Policy provides that the geographic nexus requirement is 50 miles: LCAP admits that Mobile is within 50 miles of Axis. Runoff from both the Axis facility and the Canal flows into the Mobile Bay Estuary system, part of the waters of the United States. By improving the drainage of the Canal, the United States asserts the Mobile Bay system will be remediated. This conclusion is entitled to substantial deference.

The proposed SEP does not replicate existing programs, or clearly supplant future programs. The affidavit submitted by the United States is dispositive. Although the court has carefully considered LCAP's submissions, there is no evidence of record that the Mobile Bay study area has given, or plans to give, funding to the Montlimar Canal Greenway project, as LCAP contends.

However, the government did not comply with its own recommended policy of community notification and participation in project design. Rather than conduct a public meeting, the United States delegated to Atofina, the allegedly polluting entity, the

task of locating and designing an appropriate project. Atofina, in turn, contacted the Alabama State Department of Environmental Management, which recommended the Montlimar Canal project (among others). This process failed to follow the EPA's procedure for community notification: there is no evidence the EPA held a public meeting with the local community, as the policy recommends. See 63 Fed. Reg. 24796, at 24803. Instead, Atofina alone solicited some limited organizational input: this delegation undermined the "primary role" the EPA should play in managing community involvement. Cf. Draft EPA Guidance for Community Involvement in Supplemental Environmental Projects, 65 Fed. Reg. at 40639 (2000). The SEP was not designed with the benefit of prior comment by citizen groups of the local community most directly affected by Atofina's polluting activities; that community had the ability to comment only after the SEP had been negotiated and defined.[5] By not requiring the alleged polluter to comply with the community notification policy, the EPA *potentially* allowed Atofina to give priority to irrelevant political considerations while ignoring local groups who should have been at least consulted in the SEP's design. The United States reviewed the SEP before agreeing to it, but if it had

[5]The proposed SEP is supported by other "community" groups like the Alabama Rivers Alliance, the Mobile Tricentennial Board, and the Hearin-Chandler Family YMCA. There is no evidence that these groups participated in the design of the SEP.

conditioned approval on compliance with its community notification policy, it might have clarified whether the proposed SEP serves public, rather than private, ends.

The court understands the frustration of the citizens' group in Axis, Alabama. It may have been adversely affected by Atofina's violation of the environmental laws. But that frustration does not permit rejecting a consent decree that, as a whole, serves the public interest.

III. **Conclusion**

The Consent Decree fairly, adequately, and reasonably resolves this action. As a whole, it serves the public interest. The Motion for Entry of a Consent Decree will be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
v.	:	
	:	
ATOFINA CHEMICALS, INC.	:	No. 01-7087

ORDER ENTERING CONSENT DECREE

AND NOW, this 5th day of August, 2002, for the reasons given in the foregoing memorandum, it is ordered that:

1. The United States Motion for Entry of Consent Decree (#4) is **GRANTED**.

2. The attached Consent Decree is entered, and shall be filed of record.

3. The court will retain jurisdiction over this action to the extent provided in Sections XII, XIX and XXV of the Consent Decree.

4. The clerk of court shall send a copy of the Memorandum and Order to the following individual:

Don Tolbert
LCAP
13040 N. Forest Dr.
Axis, AL 36505

Norma L. Shapiro

Norma L. Shapiro, S.J.

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

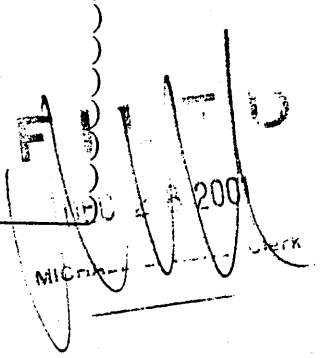
Plaintiff,

v.

ATOFINA CHEMICALS, INC.,

Defendant.

CIVIL ACTION NO. 01cv7087



CONSENT DECREE

CONSENT DECREE

WHEREAS, plaintiff, the United States of America ("United States"), by the authority of the Attorney General of the United States and through its undersigned counsel, acting at the request and on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), has filed a complaint in this action alleging various claims under environmental statutes against ATOFINA Chemicals, Inc., ("ATOFINA Chemicals" or "the Company"), formerly known as Elf Atochem, North America, Inc., at the following locations: 1) Axis, Alabama; 2) Calvert City, Kentucky; 3) Carrollton, Kentucky; 4) Houston, Texas; 5) Beaumont, Texas; and 6) Piffard, New York;

WHEREAS, prior to the filing of the Complaint, the Company met with officials of the United States to discuss reconciling claims alleged by the United States in its Complaint;

WHEREAS, the parties agree that the injunctive relief required by this Consent Decree will achieve improvements in environmental quality;

WHEREAS, in light of the settlement memorialized in this Consent Decree, the Company has not answered or otherwise responded to the Complaint;

WHEREAS, the Company, without making any admission of law or fact or evidence of the same of the non-jurisdictional allegations of the Complaint, or of any violation of any law or regulation, and the United States agree that: a) settlement of the matters set forth in the Complaint in accordance with the Consent Decree is in the best interests of the Parties and the public; and b) entry of the Consent Decree without litigation is the most appropriate means of resolving the claims in the Complaint;

WHEREAS, the Parties recognize, and the Court by entering the Consent Decree finds, that the Consent Decree has been negotiated in good faith, and that the Consent Decree is fair, reasonable and in the public interest;

NOW THEREFORE, without any admission of fact or law with respect to the claims in the Complaint, and before the taking of any testimony, without adjudication of any issue of fact or law, and upon the consent and agreement of the parties to the Consent Decree, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION, VENUE AND PARTIES

1. This Court has jurisdiction over the subject matter of this action and over the Parties pursuant to 28 U.S.C. §§ 1331, 1345 and 1355. In addition, this Court has jurisdiction over the subject matter of this action and over the Parties pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b); Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and Section 325(a), (b) and (c) of EPCRA, 42 U.S.C. § 11045(a), (b) and (c). The United States' Complaint states a claim upon which relief may be granted for injunctive relief and civil penalties against the Company under these same provisions of these Environmental Statutes. Authority to bring this suit is vested in the United States Department of Justice by 28 U.S.C. §§ 516 and 519; and Section 305 of the CAA, 42 U.S.C. § 7605; and Section 506 of the CWA, 33 U.S.C. § 1366; and in EPA by Section 325(b) of EPCRA, 42 U.S.C. § 11045(b).

2. Venue is proper in the Eastern District of Pennsylvania pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b); Section 309(b) of the CWA, 33 U.S.C. § 1319(b); Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1); Section 325(b) of EPCRA, 42 U.S.C. § 11045(b); and 28 U.S.C. §§ 1391(b) and (c), and 1395(a).

3. Notice of the commencement of this action has been given to the States of:
a) Alabama, Kentucky, and Texas as required by Sections 113(a)(1) and (b) of the CAA, 42 U.S.C. §§ 7413(a)(1) and (b), and Section 309(b) of the CWA, 42 U.S.C. § 1319(b); and b) Alabama and Kentucky as required by Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

4. Plaintiff, United States of America, is acting at the request and on behalf of the Administrator of the United States Environmental Protection Agency.

5. ATOFINA Chemicals is a corporation doing business at: Axis, Alabama; Calvert City, Kentucky; Carrollton, Kentucky; Houston, Texas; Beaumont, Texas; and Piffard, New York. The Company operates chemical plants at each of these six locations. The Company is

headquartered in Philadelphia, Pennsylvania. ATOFINA Chemicals is a "person" within the meaning of Section 302(e) of the CAA, 42 U.S.C. § 7602(e); Section 502(5) of the CWA, 33 U.S.C. § 1362(5); Section 1003(15) of the RCRA, 42 U.S.C. § 6903(15); and Section 329(7) of EPRCA, 42 U.S.C. § 11049(7).

6. For purposes of the Consent Decree, the Company waives all objections to statutory notice under §113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1), jurisdiction, and venue for subject matters or activities expressly covered by the Complaint or required by this Consent Decree.

II. APPLICABILITY

7. The provisions of the Consent Decree shall apply to, and be binding upon, the Company acting through its officers, directors, employees, successors and assigns, and upon the United States.

8. The Company agrees to be bound by this Consent Decree and not to contest its validity in any subsequent proceeding to implement or enforce its terms.

9. Effective from the Date of Lodging of the Consent Decree until its termination, the Company shall give written notice of the Consent Decree to any successors in interest prior to transfer of ownership or operation of any portion of the Six Plants and shall provide a copy of the Consent Decree to any successor in interest. The Company shall notify the United States in accordance with the notice provisions set forth in Paragraph 75 (Form of Notice), of any successor in interest prior to any such transfer. The Company, in the event of transfer, either shall retain responsibility or condition any transfer, in whole or in part, of ownership of, operation of, or other interest (exclusive of any non-controlling, non-operational shareholder interest) in any of the Six Plants that are the subject of the Consent Decree upon the execution by the transferee of a modification to the Consent Decree, making the terms and conditions of the Consent Decree that apply to such plant applicable to the transferee. The Parties shall file that modification with the Court promptly upon such transfer. Unless the Company retains responsibility, in the event of any such transfer of ownership or other interest in any of the Six Plants, the Company shall be released from the obligations and liabilities of this Consent Decree provided that, at the time of

such transfer, the transferee has the financial ability to assume and has contractually agreed to assume these obligations and liabilities.

10. The Company shall provide a copy of the Consent Decree, or any material portion thereof, to the primary consulting, engineering, and contracting firm(s) that it has retained or will retain to perform the work described in the Consent Decree upon execution of the contract.

III. OBJECTIVES

11. It is the purpose of the parties in entering this Consent Decree to further the objectives of the CAA, CWA, RCRA and EPCRA as described at Section 101 of CAA, 42 U.S.C. § 7401; Section 101 of the CWA, 33 U.S.C. § 1251; Section 1003 of RCRA, 42 U.S.C. § 6902; and Sections 301-330 of EPCRA, 42 U.S.C. §§ 11001-11050, and to resolve all allegations made by the United States in the Complaint. All plans, studies, construction, maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing the Company to consistently and fully comply with the CAA, CWA, RCRA, EPCRA, and other applicable law.

IV. DEFINITIONS

12. Unless otherwise defined herein, terms used in the Consent Decree shall have the meaning given to those terms in the Environmental Statutes, and the regulations promulgated thereunder.

13. The following terms used in the Consent Decree shall be defined as follows:

A. "ADEM" shall refer to the Alabama Department of Environmental Management.

B. "ATOFINA Chemicals" or "the Company" shall mean ATOFINA Chemicals, Inc., successor to Elf Atochem North America, Inc.

C. "Axis Facility" shall mean the facility owned and operated by the Company at Highway 43 North, Axis, Mobile County, Alabama.

D. "Beaumont Facility" shall mean the facility owned and operated by the Company at 2810 Gulf States Road, Beaumont, Jefferson County, Texas.

E. "Calendar quarter" shall mean each three month period ending on March 31st, June 30th, September 30th, and December 31st.

F. "Calvert City Facility" shall mean the facility owned and operated by the Company at 4444 Industrial Parkway, Calvert City, Marshall County, Kentucky.

G. "Carrollton Facility" shall mean the facility owned and operated by the Company at 2316 Highland Avenue, Carrollton, Carroll County, Kentucky.

H. "Consent Decree" or "Decree" shall mean this Consent Decree.

I. "Date of Lodging" shall mean the date the Consent Decree is filed for lodging with the Clerk of the Court for the United States District Court for the Eastern District of Pennsylvania.

J. "Date of Entry" shall mean the date the Consent Decree is approved or signed by the United States District Court Judge.

K. "Day" or "Days" as used herein shall mean a calendar day or days.

L. "Environmental Statutes" shall mean the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Emergency Planning and Community Right to Know Act, collectively.

M. "Houston Facility" shall mean the facility owned and operated by the Company at 2231 Haden Road, Houston, Harris County, Texas.

N. "KDEP" shall refer to the Kentucky Department of Environmental Protection.

O. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral.

P. "Parties" shall mean each of the signatories to the Consent Decree.

Q. "Piffard Facility" shall mean the facility owned and operated by the Company at Route 63, Piffard, Livingston County, New York.

R. "TNRCC" shall refer to the Texas Natural Resource Conservation Commission.

S. "Six Plants" shall refer to the Company's plants at Axis, Alabama; Calvert City, Kentucky; Carrollton, Kentucky; Houston, Texas; Beaumont, Texas; and Piffard, New York.

T. "United States" or "Plaintiff" shall mean the United States of America, including, without limitation, the Environmental Protection Agency.

U. "Working Day" means any day of the week except for Saturday or Sunday, that is not a designated Federal holiday.

V. COMPLIANCE MEASURES AND POLLUTION CONTROL PROGRAM

14. Calvert City, Kentucky

A. Clean Air Act

1. Monomer Plant

a. On or after the "commence operation" date specified in Paragraph 14.A.1.e below, and subject to the conditions in Paragraph 14.A.1.d below, the Company shall achieve and maintain control of Volatile Organic Compound ("VOC") point source emissions from the monomer plant identified in Paragraph 14.A.1.b. The Company shall utilize existing thermal oxidizer ("TO") or incinerator capacity at the Calvert City Facility for such control.

b. The Company shall capture all point source VOC emissions from the following sources at the monomer plant:

i. Kynar Monomer Air Column Vent, EP 34(4); and

ii. Kynar Monomer Lights Column Vent, EP 35(5).

c. Fugitive emissions shall not be included in the capture requirement specified in Paragraph 14.A.1.

d. The Company shall achieve a minimum destruction efficiency of 95% for the captured VOC emissions from the point sources listed in Paragraph 14.A.1.b. The 95% destruction efficiency shall be maintained, unless the Company is unable to do so as a result of an event qualifying as a malfunction under 401 KAR 50:055 and during periods when the TO and incinerator are undergoing maintenance simultaneously. During such events, the Company shall minimize emissions to the greatest extent practicable consistent with good air pollution control practices. In the case of malfunction events, the Company shall take steps consistent with 401 KAR 50:055 to expeditiously correct the conditions causing the destruction efficiency to be less

than 95%. The Company must annually record its preventative maintenance plans. To the extent practicable, simultaneous maintenance of control technology systems will be performed during times when process equipment is also shut down for routine maintenance. The Company shall schedule maintenance of either control device at a time when the other control device is anticipated to be operational.

e. To achieve continuous control, the Company shall install one or more lines or ducts, with appropriate valving equipment, necessary to allow the emission streams identified in Paragraph 14.A.1.b above to be routed to the existing TO or RCRA-permitted incinerator. Within one hundred sixty (160) days of the Date of Entry, the Company shall submit a permit application to the Kentucky Division for Air Quality ("KDAQ") and/or Kentucky Division of Waste Management ("KDWM") to meet the requirements of Paragraph 14.A.1. The Company shall commence construction within ninety (90) days of the date of receipt of all necessary permits, and shall complete construction and commence operation of the control equipment within one hundred eighty (180) days from commencement of construction.

f. By May 31, 2002, the Company shall perform the test for destruction efficiency for hydrocarbons applying the test methods and/or protocols approved pursuant to 40 C.F.R. Part 63, Subpart EEE ("National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors") or one of the following EPA-approved test methods: Method 18, 25 or 25A, as applicable. By no later than November 30, 2002, the Company shall demonstrate the 95% minimum destruction efficiency of the RCRA-permitted incinerator as specified in Paragraph 14.A.1.d.

g. Nothing in this Consent Decree shall be interpreted as overriding the Company's obligation to comply with the Hazardous Waste Combustors MACT for incinerators. The Company shall submit to EPA copies of the final, approved test protocols in accordance with Paragraph 75 (Form of Notice).

2. **K-98 Plant**

a. On and after the "commence operation" date specified in Paragraph 14.A.2.f below, the Company shall control ozone depleting substance (ODS) point source emissions from the K-98 Plant identified in Paragraph 14.A.2.b below, subject to the conditions specified in Paragraph 14.A.2.d below. The Company shall utilize existing incinerator capacity at the Calvert City Facility for such control.

b. The Company shall capture all point source ODS emissions from the AHF azeo column, Stack No. 38 at the K-98 Plant.

c. Fugitive emissions shall not be included in the capture requirement listed in Paragraph 14.A.2.b.

d. The Company shall achieve a minimum destruction efficiency of 95% for the captured ODS emissions from the AHF azeo column, Stack No. 38, at the K-98 Plant. The 95% destruction efficiency shall be maintained, unless the Company is unable to do so during events constituting malfunctions under 401 KAR 50:055 and during periods when the incinerator is being maintained. During these events, the Company shall minimize emissions to the greatest extent practicable consistent with good air pollution control practices. In the case of malfunction events, the Company shall take steps consistent with 401 KAR 50:055 to expeditiously correct the conditions causing the destruction efficiency to be less than 95%. The Company must annually record its preventative maintenance plans. To the extent practicable, maintenance of the control technology system will be performed during times when process equipment is also shut down for routine maintenance.

e. The K-98 Plant Lights Column shall not be vented through the K-98 Plant Drowning Tower in excess of 72 hours per month.

f. Within one hundred sixty (160) days of the Date of Entry, the Company shall submit a permit application to the KDAQ and/or KDWM to meet the requirements of Paragraph 14.A.2. The Company shall commence construction within ninety (90) days of the date of receipt of all

necessary permits, and shall complete construction and commence operation of the control equipment within one hundred eighty (180) days from commencement of construction.

g. By May 31, 2002, the Company shall perform the test for destruction efficiency for hydrocarbons applying the test methods and/or protocols approved pursuant to 40 C.F.R. Part 63, Subpart EEE ("National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors") or one of the following EPA-approved test methods: Method 18, 25 or 25A, as applicable. By no later than November 30, 2002, the Company shall demonstrate the 95% minimum destruction efficiency of the RCRA-permitted incinerator specified in Paragraph 14.A.2.d.

h. Nothing in this Consent Decree shall be interpreted as overriding the Company's obligation to comply with the Hazardous Waste Combustors MACT for incinerators. The Company shall submit to EPA copies of final, approved test protocols in accordance with Paragraph 75 (Form of Notice).

3. **F-141(b) Load Out**

a. The Company has implemented and will continue to operate the following improved rail car loading procedure at the F-141(b) load out station:

i. The vent of the rail car is connected to a self-contained pressure-regulating valve that is set to maintain a minimum pressure of 25 pounds per square inch gauge ("psig");

ii. The loading personnel record the steady state loading pressure on the loading form.

b. After January 1, 2003, F-141(b) emissions from the F-141(b) load out station shall not exceed six (6) tons per year on a rolling average annual basis.

B. **Clean Water Act - Representative pH Monitoring**:

No later than ninety (90) days after the Date of Entry of the Consent Decree, the Company shall apply to KDEP for a modification of the pH monitoring and reporting requirements of wastewater discharged from Outfall 001 of KPDES Permit No. KY0003603, from the once a week grab sample currently required by its KPDES permit to pH monitoring on a continuous basis as required by the modified permit. After the issuance of the modification of

the KPDES permit incorporating the continuous pH monitoring requirement, the Company shall implement monitoring of the pH of the wastewater discharged from Calvert City Outfall 001 as required by the modified KPDES Permit No. KY0003603 and shall report the results of the monitoring and sampling to KDEP with the discharge monitoring reports as required by the modified KPDES Permit No. KY0003603. The Company shall install the continuous monitor at the nearest accessible point after final treatment, but after contribution of all wastestreams and prior to actual discharge or mixing with receiving waters. The Company shall calibrate and maintain its continuous monitor device in accordance with the requirements of EPA Method 150.2 "pH, Continuous Monitoring (Electrometric)."

15. **Carrollton, Kentucky**

A. **Clean Water Act - Representative pH Monitoring:**

No later than one hundred eighty (180) days after the Date of Entry of the Consent Decree, the Company shall apply to KDEP for a modification of the pH monitoring and reporting requirements of wastewater discharged from Outfall 001 of KPDES Permit No. KY0001431 from the once a week grab sample currently required by its KPDES permit to pH monitoring on a continuous basis as required by the modified permit. After the issuance of the modification of the KPDES permit incorporating the continuous pH monitoring requirement, the Company shall implement monitoring of the pH of the wastewater discharged from Carrollton Outfall 001 as required by the modified KPDES Permit No. KY0001431 and shall report the results of the monitoring and sampling to KDEP with the discharge monitoring reports as required by the modified KPDES Permit No. KY0001431. The Company shall install the continuous monitor at Outfall 001's Parshall flume. The Company shall calibrate and maintain its continuous monitor device in accordance with the requirements of EPA Method 150.2 "pH, Continuous Monitoring (Electrometric)."

B. **Resource Conservation and Recovery Act - Hydropulper:**

1. The Company shall add a fixed cover with a hopper to enclose the hydropulper. This hopper will have a discharge capability sufficient to pass solid and liquid materials with the

ability to reliably close after the discharge and provide a seal to the hydropulper. A slide gate or equivalent device will provide the seal between the hopper and the hydropulper during processing and such slide gate or equivalent device will be in an open position only during the charging of the tank. At all other times, as required in 40 C.F.R. Parts 264/265, Subpart CC, the slide gate to the hydropulper will be kept closed during the processing of hazardous waste. This hopper will be located to allow room for a hatch that may be used to inspect and/or sample the contents of the hydropulper, and for rinsing, cleaning and removing debris from the hydropulper. The hydropulper will be vented to an activated carbon canister. The bridge crane structure will be raised to provide additional head room. A new platform level will be added to provide a work area for transfer of the solids into the hydropulper.

2. No later than forty-five (45) days after the Date of Entry, the Company shall submit a permit application to the KDAQ and/or KDWM to modify the existing hydropulper. The Company shall commence construction no later than sixty (60) days after the date of receipt of all necessary permits, and shall complete construction and commence operation of the modified hydropulper within one hundred and eighty (180) days from commencement of construction.

16. **Houston, TX**

A. The Company shall undertake the following measures concerning its discharges of storm water:

B. Storm Water Management Improvement Plan to assure storm water discharges are in compliance with the NPDES permitting program.

1. The Company shall implement a Storm Water Management Improvement Plan ("SWMIP"), as set forth in this paragraph, to improve storm water management at the Houston Facility. To improve stormwater management at the Houston Facility and to ensure that all storm water discharges are in accordance with NPDES permit requirements including maintaining and implementing a Storm Water Pollution Prevention Plan (SWPPP) and associated Best Management Practices, the SWMIP is based upon managing a five year/24 hour storm event of approximately 7.25" of rainfall. The Company shall manage all storm water at its Houston

Facility in compliance with the terms and conditions of this Consent Decree, the plan(s) developed under the terms of the Consent Decree, any TPDES permit applicable to the Facility, and any Multi-Sector General Permit ("MSGP") applicable to the Facility (TPDES Permit No. TXR05D130). Storm water segregated from process wastewater under this paragraph will be discharged from a new outfall to be designated 004, but only after the MSGP SWPPP and the associated Site Map and Best Management Practices have been modified as required by the terms of the MSGP and/or other applicable TPDES permits. The Company shall implement the SWPPP and Best Management Practices in accordance with TPDES general permit TXR050000 permit requirements, which took effect on August 20, 2001.

2. The revised SWPPP shall reflect all changes contained in the SWMIP including the construction/creation of Outfall 004, and shall satisfy the requirements of "Final National Pollutant Discharge Elimination System Storm Water Multi-Sector General Permit for Industrial Activities Notice," Federal Register, September 29, 1995; Section VIII, C, 5, or the provisions of the new MSGP once issued by the State of Texas. The SWPPP shall set forth a protocol for when and how storm water will be diverted from the WWTP system. The SWPPP shall also specifically identify the circumstances under which storm water diverted from the WWTP system will be collected and managed under the Facility's MSGP.

3. Within thirty (30) days of the Date of Entry of this Consent Decree, the Company shall commence activity on the following items:

a. Install the system of trenches and diversion walls to collect and manage storm water runoff from the more than two paved acres in the west area of the Facility, and if the construction activity disturbs more than one (1) acre, then the Company shall obtain coverage under the NPDES storm water construction general permit (63 Fed. Reg. 36489-36519) and comply with that permit;

b. Install a block valve and piping to provide the capability to divert storm water flow from the area outside the lower tank farm containment area, which presently is directed to the WWTP, to the trenches identified in Paragraph 16.B.3.A. above;

c. Install a flow control valve in the inlet piping to the carbon absorber to better control and maximize flow through the WWTP by controlling the water level in the Filter Feed Sump at the optimum height relative to internal weirs;

d. Rework piping that conveys wastewater from the Oil/Water Separator to the Filter Feed Sump to eliminate a low point where solids may build up;

e. Replace the 250 gallon per minute ("gpm") capacity submersible pumps that are used to convey water from the basin to the WWTP with two new 600 gpm capacity submersible pumps;

f. Replace pump discharge piping associated with the submersible pumps referenced in Paragraph 16.B.3.e. above, with piping appropriately sized to accommodate the increased flow from the larger pumps; and

g. Increase water retention capacity in the basin by 80,000 gallons by raising the weir at the TPDES permit outfall No. 002 by approximately six inches.

4. EPA acknowledges that the SWMIP submitted by letter dated March 24, 2000, is satisfactory under this Consent Decree and that this SWMIP and the revised SWPPP dated January 8, 2001, completely address any outstanding concerns raised in the Region VI issued Administrative Order No. VI-98-3525.

5. Within two hundred and seventy days (270) days of the Date of Entry of this Consent Decree, the Company shall complete all measures set forth in Paragraph 16.B.3. above.

VI. ENVIRONMENTALLY BENEFICIAL PROJECTS

17. **Carrollton, Kentucky**

A. **Clean Air Act**

1. The Company shall continue to operate the following systems in order to reduce air emissions:

a. The S21 nitrogen recycle system. The Company will continue to route the nitrogen used in filter cake drying for the S-21 process through the closed loop nitrogen recycle system. The closed loop filter cake drying nitrogen recycle system consists of passing the nitrogen through two chilled condensers in series, for solvent recovery/recycle, followed by reheating and subsequent recycle of the nitrogen through the closed loop drying system.

b. The Chiller/Condenser system. The Company will continue to operate the improved Chiller/Condenser system or an equivalently effective alternative Chiller/Condenser system. The Chiller/Condenser system improvements include the following enhancements:

i. Installation of a new vent header at B39;

ii. Installation of two (2) 110 ton glycol chillers designed to operate at sub-zero temperatures;

iii. Installation of a process vent condenser (two temperature stage heat exchangers) at B06, B33, B38, and B39; and

iv. Connection of the existing B46 vent condenser to the new glycol chiller system.

2. The Company shall install a TO for control of VOCs from the point source emissions from the process vents at the following buildings: B29, B32, B39, B06, B33, B38, B03, B46, and B48. If the Company is successful in its current efforts to eliminate the utilization of heptane in its B48 process prior to installation of the TO, the B48 process vents need not be connected to the new TO control technology.

a. Fugitive emissions shall not be included in the control requirement specified in Paragraph 17.A.2.

b. The Company shall achieve a minimum destruction efficiency of 95% for the TO. The 95% destruction efficiency shall be maintained unless the Company is unable to do so during an event constituting a malfunction under 401 KAR 50:055. During these events, the Company shall minimize emissions to the greatest extent practicable. In the case of malfunction events, the

Company shall take steps consistent with 401 KAR 50:055 to expeditiously correct the conditions causing the destruction efficiency to be less than 95%. The Company must annually record its preventative maintenance plans. To the extent practicable, maintenance of the control technology system will be performed during times when process equipment is also shut down for routine maintenance.

c. Within one hundred eighty (180) days of the Date of Entry, the Company shall submit a permit application to the KDEP to meet the requirements of Paragraph 17.A.2. The Company shall commence construction within ninety (90) days of the date of receipt of all necessary permits. The Company shall commence operation of the control equipment and control the VOC point source emissions from the process vents at B03 and B39 within four hundred sixty (460) days from commencement of construction, and shall complete construction and commence operation of the TO for the VOC point source emissions from the process vents at B29, B32, B06, B33, B38, B46 and B48 within seven hundred thirty (730) days from commencement of construction.

d. No later than thirty (30) days after the date of completion of construction of the control system required by Paragraph 17.A.2., the Company shall submit to EPA the test protocol to demonstrate compliance with the destruction efficiency specified in Paragraph 17.A.2.b. The test protocol shall identify the reference test method (and any modifications thereto) contained at 40 C.F.R. Part 60, Appendix A that will be followed during the compliance demonstration testing. No later than one hundred eighty (180) days after the completion of construction of the control system required by Paragraph 17.A.2., the Company shall complete shakedown of the control system and demonstrate compliance with the destruction efficiency specified in Paragraph 17.A.2.b.

3. No later than two hundred seventy (270) days from the Date of Entry, the Company shall complete installation and begin operation of a nitrogen demand system for the Grignard Pads located at B06, B33, B38, and for process B39. The nitrogen demand system will include:

a. Modification of the vent header piping at B06, B33, and B38 pads to divide each header into five sections -- Grignard, coupling and extraction vent piping, wet solvent header, and dry solvent header that includes the solvent recovery still;

b. Installation of nitrogen regulators and conservation vents at appropriate locations in the vent headers at B06, B33 and B38 to provide nitrogen blanketing on a demand basis, to replace the continuous nitrogen purge currently in use;

c. Installation of an oxygen analyzer at B39 to monitor the oxygen level in the vent header to control the nitrogen purge; and

d. Installation of bi-directional detonation flame arresters at all tank vents at B06, B33, B38, and B39 to replace the existing vent-line flame arresters.

VII. SUPPLEMENTAL ENVIRONMENTAL PROJECT

18. The Company shall fund and implement the Supplemental Environmental Project ("SEP") described in detail in Appendix A to the Consent Decree in an amount not less than Three Hundred Thousand dollars ($300,000.00). The Company hereby certifies that, to the best of its knowledge, it is not otherwise required, by virtue of any local, state or federal statute, regulation, order, consent decree, or other law, to fund or perform this SEP. The Company further certifies that it has not already received, and is not currently negotiating to receive, credit in any other federal or state action for the SEP.

19. Upon completion of the SEP described in Paragraph 18, the Company shall submit a SEP Completion Report containing the following information:

A. A detailed description of the SEP as implemented;

B. A description of any operating problems encountered and the solutions thereto;

C. Itemized costs, documented by copies of purchase orders and receipts or canceled checks or other evidence of expenses such as the Company's project expenditure documents;

D. Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Decree; and

E. A description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification or estimate of the benefits and pollutant reductions, if reasonably feasible).

20. Following receipt of the SEP Completion Report for the SEP, EPA shall within sixty (60) days either: a) accept the SEP Completion Report; or b) reject the SEP Completion Report, notifying the Company, in writing, of deficiencies in the SEP or the SEP Completion Report and grant the Company an additional reasonable time in which to correct any deficiencies and submit a revised SEP Completion Report. EPA may reject the SEP Completion Report if the SEP as performed or the SEP Completion Report as drafted did not satisfy the requirements of this Consent Decree.

21. Any public statement, oral or written, in print, film, or other media, made by the Company making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency."

22. Failure to fund and implement the SEP as required by Paragraph 18 will subject the Company to stipulated penalties as set forth in Paragraph 28.

VIII. REPORTING

23. Beginning with the first full calendar quarter following the Date of Entry of the Consent Decree, the Company shall submit in writing to the individuals identified in Paragraph 75 (Form of Notice), a report containing a summary of the work or testing performed pursuant to the Consent Decree during the preceding calendar quarter. Notification to the United States pursuant to this Paragraph of any anticipated delay, by itself, shall not excuse the delay. Such reports shall be prepared and submitted each calendar quarter thereafter in accordance with Paragraph 75 until the termination of this Consent Decree. Reports shall be due on the fifteenth (15th) day of the month immediately following the reporting period.